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BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the matter of the Request for Agency Action of BERRY PETROLEUM COMPANY, LLC, a wholly owned subsidiary of LINN Energy, LLC as successor in interest to Berry Petroleum Company, for an order force-pooling the interest of all owners refusing or failing to bear their proportionate share of the costs of drilling and operating the wells located in the drilling and spacing units in the E½ of Section 5 and all of Section 7 in Township 6 South, Range 4 West, USM, Duchesne County, Utah.	**Utah Division of Oil, Gas and Mining's Hearing Memorandum** Docket No. 2014-012 Cause No. 272-04

The Utah Division of Oil, Gas and Ming ("**Division**") submits this Hearing Memorandum for the hearing on whether to grant or deny the Amended Request for Agency Action filed by Berry Petroleum Company, LLC ("**Berry**") on May 28, 2014.

INTRODUCTION

In this matter, Berry seeks to force-pool certain federal lands. There is only one working-interest owner who has not consented or agreed to participate—Burton/Hawks, Inc. ("**Burton/Hawks**"). The Division raised concerns about the opportunity-to-participate notice and due process (or whether the submitted evidence showed sufficient diligence in trying to reach Burton/Hawks) with Berry in previous conversations and with the Board in its previous memorandum. The request has been continued a few times and over that period Berry has submitted a couple of supplemental exhibits and affidavits and an amended request addressing some of these concerns.

In addition to a few issues that the Division will discuss at the hearing on May 28, 2014, the Division provides this memorandum to explain how due process analysis applies to opportunity-to-participate notifications. The Division does not necessarily oppose Berry's requests, but merely wishes to provide the proper sources of law the Board should use when making a decision. Providing this analysis hopefully will assist the Board in its decision-making process and result in an order that will help future petitioners and the Division understand what process or evidence is sufficient and persuasive.

The memorandum first will discuss what the Utah Oil and Gas Conservation Act ("**the Conservation Act**"), Utah Code Ann. §§ 40-6-1 to -21 (West 2013), the Utah Supreme Court, and the U.S. Supreme Court require in regard to opportunity-to-participate notices and due process. Second, it will discuss some recent Utah Supreme Court decisions on due process and

due diligence. Third, and finally, it will apply the facts of this matter to the developed law to give Berry and the Board an opportunity to address the material issues at the hearing.

DISCUSSION

I. The Conservation Act, the Utah Supreme Court, and the Fourteenth Amendment give unlocatable interest owners due process protections.

A. The Conservation Act requires a petitioner seeking forced pooling to give written notice to a working-interest owner before a party can be considered "nonconsenting."

"In the absence of a written agreement for pooling [between mineral owners], the board may enter an order pooling all interests in a drilling unit." Utah Code Ann. § 40-6-6.5(2)(a). When a party is unlocatable, it precludes mineral owners from forming a voluntary, written pooling agreement. Thus one of the few options left for a mineral owner hoping to pool is to request a force-pooling under section 6.5 of the Conservation Act. The Conservation Act does not use the term unlocatable, and does not expressly say that the Board can force-pool an unlocatable person's interests, but it has long been the practice in Utah for Board to do so. Instead of "unlocatable," subsections 6.5(4)(b)[1] and 6.5(4)(d)[2] use the term "nonconsenting."

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[1] "Each pooling order shall provide for reimbursement to the consenting owners for any nonconsenting owner's share of the costs out of production from the drilling unit attributable to his tract." Id. § 40-6-6.5(4)(b) (emphasis added).

[2] Each pooling order shall provide that each nonconsenting owner shall be entitled to receive . . . the share of the production of the well applicable to his interest in the drilling unit after the

Subsection 2(11) defines a nonconsenting owner as "an owner who after written notice does not consent in advance to the drilling and operation of a well or agree to bear his proportionate share of the costs." It seems only logical that an unlocatable would necessarily be nonconsenting because a missing person surely could not consent or agree to anything. However, this might be a slight over-simplification because of the clause "after written notice." Before one could be classified as nonconsenting, the person must receive some kind of notice. Whether that notice must be actual or if it can be constructive notice is not addressed within the Conservation Act. The Utah Supreme Court's decision in Hegarty v. Board of Oil, Gas and Mining, 2002 UT 82, 57 P.3d 1042 gives some guidance on that question.

B. The Hegarty decision implies that at least notice satisfying due process is required before the Board may force-pool a working-interest owner.

In Hegarty, the Utah Supreme Court held that an owner who had received numerous opportunities to lease and participate in a federal unit was ***not*** a nonconsenting owner until after they had received an opportunity to participate in a particular well. Id. ¶¶ 28–34. In that case, Hegarty was locatable—in fact, the operator had made multiple contacts with the working-interest owners.

As the Court began its analysis of whether Hegarty was a "nonconsenting owner," it acknowledged that the forced-pooling statute instituted a penalty then said, "Imposition of a

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consenting owners have recovered from the nonconsenting owner's share of production . . . ." Id. § 40-6-6.5(4)(d)(i) (emphasis added).

statutory penalty demands ***strict adherence to statutory notice requirements***." Id. ¶ 29 (emphasis added). Then the Court stated that "the threshold requirement for nonconsent is the ***establishment of written notice*** sufficient to trigger the necessity for consent . . . ." Id. (emphasis added). It restated that proposition again—"An owner and written notice must be established before consent . . . can become an issue." Id. ¶ 31.

After the Court discussed some of the facts particular to the Hegarty case, it then stated, "In such a context, notice cannot be inferred. ***Only actual, detailed, specific, written*** notice of a ***well*** can satisfy the [Conservation] Act." Id. ¶ 32 (first emphasis added, second emphasis in original). Again, in Hegarty, the alleged nonconsenter was locatable and was available to receive written notice at any time. Therefore, the Court must have been addressing only how specific, detailed, and particular an opportunity-to-participate notice must be, not about how diligent a petitioner's effort to find an unlocatable interest owner. Even though there might be an argument that the Court held that constructive or inferred notice must never satisfy the Conservation Act, this interpretation seems unlikely because that would foreclose force-pooling whenever a party is completely unlocatable, no matter how hard the operator looked. Under the Utah Supreme Court's logic, a petitioner must give due notice, if not actual notice, which means the petitioner must (1) diligently look for an unlocatable and (2) to provide the "detailed, specific, written notice." See id.

C. The U.S. Supreme Court has held that the Fourteenth Amendment gives unlocatable interest owners due process protections.

Due notice, or notice that satisfies, the Due Process Clause,[3] means—as the U.S. Supreme Court defined it—"notice ***reasonably calculated, under all the circumstances, to apprise***" the party. Mullane, 339 U.S. at 314 (emphasis added). Although due notice is an easier standard to satisfy than actual notice, it is still quite stringent. In Mullane, the U.S. Supreme Court stated, "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one ***desirous of actually informing the absentee*** might reasonably adopt to accomplish it." 339 U.S. at 315 (emphasis added).

Interestingly, the circumstances of that case involved the pooling of multiple trusts, so it is not that dissimilar to what the Board is asked to do in this matter. The major difference is that the party seeking to pool was not asking the government to assess a penalty against any of the pooled interests, so our matter might require more efforts to notify the absent party than what the U.S. Supreme Court required. Notwithstanding that distinction, the Court held that in that circumstance, the "beneficiaries . . . whose interests or whereabouts could not ***with due diligence*** be ascertained" could be notified by a form of publication. Id. at 317. Similarly it held that for known and locatable beneficiaries, notice only by publication was inadequate. Id. at 318.

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[3] No state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. For the Board to pool or impose a penalty without due process would violate due process. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Shelley v. Kraemer, 334 U.S. 1, 16 (1948) (regarding a penalty).

Importantly, the U.S. Supreme Court refrained from holding that due notice or due diligence requires actual, written notice because that requirement would obstruct the state from performing important acts. Id. at 313. It held, "A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Id. at 313–14.

II. The Utah Supreme Court and the Rule 4 of Utah Rules of Civil Procedure provide more guidance on what constitutes due notice.

The Mullane decision was issued almost sixty-five years ago, but it still is the controlling case on the question of what diligence satisfies due process. Indeed, the Utah Supreme Court recently relied heavily on the Mullane decision to analyze due notice. Salt Lake City Corp. v. Jordan River Restoration Network, 2012 UT 84, ¶ 48–72, 299 P.3d 990. The Utah Supreme Court employed a framework analyzing the question of whether notice was sufficient. The Court balanced "the 'individual interest sought to be protected by the' Due Process Clause against the government's interest" as well as considering "the likely benefit of additional or substitute means of notice." Id. ¶ 56 (quoting and citing Mullane, 339 U.S. at 314) (citing Jones v. Flowers, 547 U.S. 220, 234–37 (2006); Dusenbery v. United States, 534 U.S. 161, 170–71 (2002)).

Before applying that framework on the particular facts of the Berry and Burton/Hawks matter, there is another Utah Supreme Court case that shares remarkably similar facts to this Berry matter that it warrants close examination. In 2004, the Utah Supreme Court held that a plaintiff failed to serve proper notice to a defendant in a quiet title action. Jackson Constr. Co. v. Marrs, 2004 UT 89, 100 P.3d 1211 (2004). The plaintiff, Jackson Construction, had filed a

complaint claiming a quiet title action against two cotenants. Id. ¶ 4. Simultaneously, Jackson Construction moved the court to allow it to effectively serve the defendants by publication rather than in person, id., as would be allowed under Rule 4(d)(4) of Utah Rules of Civil Procedure.

Under Rule 4(d)(4), the Court would require a plaintiff requesting the right to serve a defendant by a means other than in person to first show that they had made "reasonably diligent efforts to locate the party to be served." Jackson Constr., 2004 UT 89, ¶ 11. This rule adopts the Mullane standards. Id. In its request to be allowed to make alternative service, Jackson Construction "represented that it had mailed a letter addressed to [the defendants] at their last known address in California and that the letter had been returned as 'undeliverable.'" Id. ¶ 4. Though the district court thought Jackson Construction's representations were adequate, the Utah Supreme Court disagreed.

Jackson Construction argued to the Utah Supreme Court that the level of diligence required in property case depends on the degree of "past attentiveness" of the other party. Id. ¶ 14. It argued that the defendants were "indifferent toward the property." Id. For example, the defendants had failed to pay their taxes, upkeep the property, or maintain a current address in the county recorder's office. Again, the Utah Supreme Court disagreed and held that an owner's apparent inattentiveness to their property does not relieve the plaintiff from reasonable diligence, which is determined by focusing "on the ***plaintiff's*** efforts to locate the defendant." Id. ¶ 15 (emphasis in original). The Court provided relevant factors that can be considered: **(1)** the number of defendants involved, **(2)** the projected expense of searching for them, and **(3)** the type of sources of available information regarding their possible whereabouts. Id. Factors that are

not relevant and should not be considered are **(a)** "assumptions regarding a defendant's interest in the rights to be adjudicated," id.; **(b)** "a party's 'ability to take steps to safeguard its interests,'" id. ¶ 16 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983)); or **(c)** a defendant's past actions regarding the property, id. ¶¶ 17–18. To be sure, due diligence does not mean one must "exhaust all possibilities," id. ¶ 19 (quoting Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 509 (Utah 1976)) (internal quotation marks omitted), nor is due diligence "all possible diligence which may be conceived." id. (quoting Parker v. Ross, 217 P.2d 373, 379 (Utah 1950) (Wolfe, J., concurring) (internal quotation marks omitted)).

The Court finally stopped talking in the abstract and gave some helpful real-life, practical examples:

> A plaintiff who focuses on only one or two sources, while turning a blind eye to the existence of other available sources, falls short of this standard. In a case such as this, involving out-of-state defendants, a plaintiff might attempt to locate the defendants by checking telephone directories and public records, contacting former neighbors, or engaging in other actions suggested by the particular circumstances of the case. Advances in technology, such as the Internet, have made even nationwide searches for known individuals relatively quick and inexpensive.

Id. ¶ 20.

Jackson Construction's three efforts to reach the defendants included obtaining an address from the county recorder, mailing a letter that was returned as undeliverable, and published notice in The Spectrum newspaper in Washington County. Id. The Court was also skeptical if the publication in The Spectrum newspaper was reasonable when Jackson

Construction knew the defendants were out-of-state. Id. ¶ 22. So upset, the Court penned some fairly colorful language to express itself—"Service of process in this case was functionally equivalent to rolling up the summons, shoving it into a bottle, and throwing it into the ocean." Id.

III. Applying the above legal standards to the Berry matter.

The Board should apply all the sources of law discussed above, including even Rule 4 of the Rules of Civil Procedure,[4] to the facts of this proceeding.

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[4] Normally the Rules of Civil Procedure do not bind the Board; however, Rule R641-106-230 declares that "persons otherwise entitled to personal service under these rules may be served by publication or mail in accordance with Rule 4(f)," which is now Rule 4(d)(4) that the Utah Supreme Court discussed in Jackson Construction. For the Board's convenience, Rule 4(d)(4) is provided here:

> (d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.
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> (d)(4)(B) If the motion is granted, the court shall order service of process by means reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of

A. A brief restatement of the facts of this matter.

Berry seeks to pool the mineral interests of certain lands. Berry has obtained voluntary pooling agreements with all working-interest owners except Burton/Hawks. Berry first filed the request to force-pool Burton/Hawks's interests without submitting any evidence of what efforts it has made to find Burton/Hawks. Later, it submitted Supplemental Exhibits, which included Exhibits I and J. Exhibit I is an Affidavit of Terry L. Laudick, where he stated that researched public records for Burton/Hawks's existence. Mr. Laudit believes that the working-interests are owned by either Burton/Hawks, Hawks Industries, Inc., or EMEX Corp. Exhibit J is a letter sent to the address Berry found in the Duchesne County Recorder's Office, which was returned. This letter included an attached spreadsheet that includes a summary of the total AFE amounts and the net, working-interest share in eighteen of the twenty-four wells it currently seeks to pool. After a motion to continue the matter, Berry amended its request and filed a second affidavit of Mr.

> the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.
>
> (d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made.

Laudick. The second affidavit gave more specific information about the obtained public records that and provided copies of some of those public records.

B. Whether Berry's opportunity-to-participate notice was sufficiently detailed and specific.

Under Hegarty, an opportunity-to-participate notice must be detailed and specific. 2002 UT 82, ¶ 32. Whether the letter from Mr. Laudick to Burton/Hawks and the attached spreadsheet is sufficiently detailed and specific is a question that the Board will need to answer. Surely this notice will not satisfy the Hegarty requirements for the six wells that are not listed in the letter. Those wells include: Federal 9-5D-64, Federal 10-5D-64, Federal 15-5D-64, Federal 16-5D-64, Federal 15-7D-64, and Federal 16-7D-64.

In regard the remaining eighteen wells that are included in the letter, the Division has seen more detailed and specific notices in the past; however, it knows of no other sources of law to give the Board further guidance on making that determination, except for the general principles set forth in Hegerty, 2002 UT 82, ¶¶ 28–34.

C. Whether Berry's attempts to find and reach-out to Burton/Hawks were diligent enough to satisfy due process protections.

Under Jackson Construction, merely obtaining an address from the county recorder's office and mailing the notice to it is not due diligence or due notice if the letter is returned as undeliverable. 2004 UT 89, ¶ 22. And publishing a notice in the local newspaper would not cure the insufficiency, if the party is out of state. Id.

It appears Berry has done more than merely obtaining an address from the county recorder and mailing a letter. In addition to sending the opportunity-to-participate notice to the address obtained from the county recorder office, the second affidavit from Mr. Laudick shows that he collected a number of public records.

However, the Division's concern is whether the sole act of collecting the public records was enough to constitute due diligence. From reading Mr. Laudick's second affidavit, it remains ambiguous if he or any of Berry's agents attempted to contact any of the persons listed within those public records. Collecting the records is surely necessary, but that alone cannot be sufficient because the mere act of collecting records is not "reasonably calculated . . . to apprise." Mullane, 339 U.S. at 314. Due diligence requires reaching out. The only evidence that the Division has of Berry reaching out to Burton/Hawks is the letter to an address obtained from the county recorder office, which was returned. This would be dangerously close to the facts of Jackson Construction, which the Utah Supreme Court dramatically declared insufficient when property is at stake. Maybe this pooling matter differs from the circumstances of Jackson Construction because this is not a quiet title action and proceeding is not taking place in court; however, this action will affect Burton/Hawks's property interest by assessing a penalty against it, which the Utah Supreme Court was reluctant to do in Hegarty.

Perhaps Berry will present testimony at the hearing evincing its diligent attempts to reach out to Burton/Hawks or whoever it believes might own the working interests today. If so, the Division will be interested in **(1)** when Berry gathered the government records, **(2)** what efforts were made to reach out to the approximately fifteen persons listed in the public records, **(3)** the

cost and time it would have taken for Berry to write, research, and call these persons, and **(4)** what Berry's current estimation of how much money is at stake if the Board were to issue a 300% penalty against Burton/Hawks's interests. To assist the Board and Berry, the Division has attached a list of the persons whose name or contact information or both was included in the second affidavit.

LIST OF PERSONS

1. ***Bill Hawks*** who was identified as President on the Certificate of Merger of Burton/Hawks into Hawks Industries, Inc. and as the President of Hawks Industries, Inc. on the Colorado Secretary of State's Certificate of Assumed or Trade Name.

2. ***William J. Hawks***, Building, Casper, Wyoming, 82601, as identified as the Registered Agent on the Wyoming's Secretary of State's Filing Information.

3. ***William T. Miller*** who was identified as Secretary on the Certificate of Merger of Burton/Hawks into Hawks Industries, Inc. and as the Secretary of Hawks Industries, Inc. on the Colorado Secretary of State's Certificate of Assumed or Trade Name.

4. ***CT Corporation System***, 50 West Broadway, 8th Floor, Salt Lake City, Utah 84101 or 1108 East South Union Avenue, Midvale, Utah, 84047, which was identified as a Registered Agent for Burton/Hawks on the website of the Utah Division of Corporations and Commercial Code.

5. ***Hawks Industries, Inc.*** at 7383 6WN Road, Casper, Wyoming, 82604, which was listed on the Colorado Secretary of State's Certificate of Assumed or Trade Name and Application for Certificate of Authority; Delaware's Secretary of State's Certificate of Merger; and a Division of Oil, Gas and Mining Change of Name Notification.

6. ***Hawks Industries, Inc.*** at 913 Foster Road, Casper Wyoming, 82601, which was identified as the "Principal office street address" on the Colorado Secretary of State's Summary of ID Number 19891017687.

7. ***Jack R. Viders***, 633 Chestnut, Casper, Wyoming, who was identified as the registered agent for Hawks Industries, Inc. on the Colorado Secretary of State's Application for Certificate of Authority.

8. ***Joseph J. McQuade***, 6230 Chestnut, Casper, Wyoming, who was identified as Vice President and Director for Hawks Industries, Inc. on the Colorado Secretary of State's Application for Certificate of Authority.

9. ***William A. Swan, III***, 18 Sandringham, Piedmont, California, who was identified as Director for Hawks Industries, Inc. on the Colorado Secretary of State's Application for Certificate of Authority.

10. ***William T. Miller***, 1502 S. Wolcott, Casper, Wyoming, who was identified as "Secretary/Treasurer and Director" for Hawks Industries, Inc. on the Colorado Secretary of State's Application for Certificate of Authority.

11. ***Barb L. Gamble*** who was identified as the "Assistant—Secretary/Treasurer" for Hawks Industries, Inc. on the Colorado Secretary of State's Application for Certificate of Authority.

12. ***The Corporation Trust Company***, 1209 Orange Street, Wilmington, Delaware, 19801, which was identified as Registered Agent for Hawks Industries, Inc. on the Delaware Secretary of State's website and listed on the Colorado Secretary of State Application for Certificate of Authority.

13. ***The Corporation Co.***, 1675 Broadway, Denver Colorado, 80202, which was identified as Agent on the History and Documents for Hawks Industries, Inc.

14. ***Joy K. Mosley***, 251 Jeanell Drive Suite 3, Carson City, Nevada, 89703, who was identified as the Treasurer for EMEX Corp. on the Nevada's Secretary of State's website.

15. ***Stuart Schwartz***, 251 Jeanell Drive Suite 3, Carson City, Nevada, 89703, who was identified as the Secretary for EMEX Corp. on the Nevada's Secretary of State's website.

16. ***Walter Tyler***, 251 Jeanell Drive Suite 3, Carson City, Nevada, 89703, who was identified as the President for EMEX Corp. on the Nevada's Secretary of State's website.

17. ***James L. Kelly***, 100 W. Liberty, Street 10th Floor, Reno, Nevada, 89501, who was listed at one time as the Registered Agent for EMEX Corp. on the Nevada's Secretary of State's website listing the Entity Actions for EMEX Corp.

CONCLUSION

Again, the Division has formed no opinion of whether the matter should be granted or denied at this point. This memorandum is to provide the relevant legal sources to the Board to assist in its decision-making.

RESPECTFULLY SUBMITTED this 22d day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **HEARING MEMORANDUM** for Docket No. 2014-012, Cause No. 272-04 to be mailed via E-Mail, and First Class Mail, with postage prepaid, this 23rd day of May, 2014, to the following:

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